



4310-K6

ADVISORY COUNCIL ON HISTORIC PRESERVATION

Notice of Issuance of Program Comment to Tailor the Federal Communications Commission's Review for Undertakings Involving the Construction of Positive Train Control Wayside Poles and Infrastructure.

AGENCY: Advisory Council on Historic Preservation

ACTION: Notice.

SUMMARY: The Advisory Council on Historic Preservation (ACHP) issued a Program Comment at the request of the Federal Communications Commission (FCC) to tailor its review, under Section 106 of the National Historic Preservation Act, of undertakings involving the construction of Positive Train Control wayside poles and infrastructure.

DATES: The Program Comment was issued by the ACHP on May 16, 2014 and went into effect that day.

ADDRESSES: Address all questions concerning the Program Comment to Charlene Dwin Vaughn, AICP, Office of Federal Agency Programs, Advisory Council on Historic Preservation,

1100 Pennsylvania Avenue, N.W., Suite 803, Washington, DC 20004. The ACHP will soon be moving, so that address will change on June 2, 2014 to 401 F Street NW, Suite 308, Washington DC 20001-2637. You may submit questions through electronic mail to: cvaughn@achp.gov.

FOR FURTHER INFORMATION CONTACT: Charlene Vaughn at cvaughn@achp.gov.

SUPPLEMENTARY INFORMATION: Section 106 of the National Historic Preservation Act (Section 106) requires federal agencies to consider the effects of their undertakings on historic properties and to provide the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment with regard to such undertakings. The ACHP has issued the regulations that set forth the process through which Federal agencies comply with these duties. Those regulations are codified under 36 CFR part 800 (Section 106 regulations).

Under Section 800.14(e) of those regulations, agencies can request the ACHP to issue a "Program Comment" on a particular category of undertakings in lieu of conducting reviews of each individual undertaking under such category, as set forth in 36 CFR 800.3 through 800.7. An agency can

meet its Section 106 responsibilities with regard to the effects of particular aspects of those undertakings by taking into account an applicable Program Comment that has been issued by the ACHP and following the steps set forth in that comment.

I. Background

The ACHP has issued a Program Comment to tailor the Federal Communications Commission's (FCC) Section 106 review for undertakings involving the construction of Positive Train Control (PTC) wayside poles and infrastructure. According to the requirements for obtaining a Program Comment, the FCC formally requested the ACHP to issue the mentioned program comment on March 5, 2014. After the ACHP staff made several revisions to the Program Comment, the ACHP membership voted in favor of issuing the revised Program Comment via an unassembled vote that concluded on May 16, 2014.

The need for this Program Comment relates to the Congressional enactment of the Rail Safety Improvement Act of 2008 (P.L. 110-432) (RSIA) on October 16, 2008, which requires freight and passenger railroads to deploy interoperable PTC systems by December 31, 2015. RSIA requires PTC system implementation on all Class 1 railroad lines that carry poison- or toxic-by-inhalation hazardous

materials and five million gross tons or more of annual traffic, and on any railroad's main line tracks over which intercity or commuter rail passenger train service is regularly provided. In addition, RSIA provides the Federal Railroad Administration (FRA) with the authority to require PTC system implementation on any other line.

Congress passed RSIA in response to a tragic railroad accident between a Southern California Regional Rail Authority Metrolink commuter train and Union Pacific freight train that occurred in Chatsworth, California, on September 12, 2008, killing 25 and injuring 100 persons. While this accident gained a high level of public attention, other railroad accidents have continued to occur. FRA documented in its annual report issued in 2011 that an average of 2,000 derailments and 205 train collisions occurred annually from 1998 to 2009, excluding accidents at highway-rail crossings. Given the high probability of derailments and train collisions continuing to occur on passenger and freight railroads as well as intercity commuter, the implementation of the provisions in RSIA, and related regulations implemented by FRA and FCC is critical.

PTC systems generally use radio signals between trains and a land-based network to prevent certain railroad

accidents. When operating, PTC systems will be capable of controlling or stopping a train when a train operator is unavailable or unresponsive and action is required to avoid a derailment, incursion into a work zone, certain train-to-train collisions, or movement through a switch left in the wrong position. Wayside poles are the vertical structures that will be used to support fixed wireless antennas within the existing railroad right of way alongside existing tracks. The antennas are used to support the wireless flow of information needed for the operation of PTC. Wayside infrastructure refers to the wayside pole associated equipment cabinets and other supporting infrastructure. Approximately 30,000 wayside poles will be required nationwide, of which at least 10,000 poles have already been installed.

Various factors, including the public safety need for the PTC system, the approaching December 2015 mandatory deadline, and the sheer number of poles and infrastructure needed, argued for tailoring the Section 106 review of PTC wayside poles and infrastructure as provided by this Program Comment.

II. Public Input and Revisions to the Program Comment

To develop the Program Comment, the FCC issued two Public Notices on the PTC wayside facilities program on

September 27, 2013, and January 29, 2014. Approximately 60 comments were filed by diverse stakeholders during this period. FCC held two scheduled tribal consultations with several federally recognized tribes in 2013 in Oklahoma and South Dakota. Railroads representatives and FRA participated in both meetings to provide technical presentations on PTC and its engineering. The FCC has been consulting with State Historic Preservation Officers (SHPOs) regularly, and particularly with those who received submissions from railroads on PTC projects.

FCC has worked extensively with FRA and the railroad industry to consider options for developing an efficient Section 106 review process for PTC construction. FRA also had received several PTC implementation plans submitted by railroads pursuant to the PTC regulations published in January 2010. This information reflects the location of the tracks on which PTC systems will be deployed; the types of systems that would be used; and the anticipated number of wayside poles to support the PTC system.

The ACHP received the official FCC request for a Program Comment on March 5, 2014.

The ACHP notified the SHPOs, Indian tribes, and railroads via broadcast e-mails on March 12, 2014, that it was in receipt of FCC's draft Program Comment, and provided

them a copy for review and comment. Subsequent to this notification, teleconferences were held for Indian tribes, SHPOs, and railroads to review their historic preservation concerns before the deadline for written comments. The ACHP received 36 written comments.

On April 24, 2014, the ACHP notified stakeholders via broadcast e-mail about the request for an extension and FCC's approval of the new deadline of May 16 for ACHP action on the Program Comment. The ACHP staff revised the FCC proposed Program Comment, and provided it to stakeholders for review and comment, after which teleconferences were scheduled with each stakeholder group prior to the comment deadline. The ACHP received 21 comments by the May 6th deadline. An in-person Section 106 consultation meeting was also held on May 6th to discuss with stakeholders the substance of the final Program Comment.

The stakeholder comments raised several procedural and substantive issues. For instance, the railroad industry requested that the ACHP exempt the construction of PTC wayside poles and infrastructure from the requirements of Section 106 per 36 CFR 800.14(c). While the ACHP staff considered that request, it declined to pursue it due to concerns that such an exemption may not meet regulatory

requirements. In particular, due to the high number of poles, their height, the level of subsurface disturbance resulting from their installation, and the potential that previously unknown archaeological sites may be impacted, it is questionable whether the requirement for an exemption that the poles' "potential effects ... upon historic properties [would be] foreseeable and likely to be minimal or not adverse" would be met. 36 CFR 800.14(c)(1)(ii).

Another salient issue revolved around whether to make the use of the FCC's Tower Construction Notification System (TCNS) a requirement under the Program Comment. While the railroad industry noted its concerns about the use of TCNS, particularly questioning its capacity to handle the volume of submissions and possible geographic area limits for such submissions, the use of TCNS was seen by the staff as necessary to make tribal involvement feasible and provide the FCC with the ability to respond to disputes within the short deadlines provided by the Program Comment. Given that TCNS is the most sophisticated and consistently used communication system with all federally recognized tribes, the existence of this system should give Indian tribes some assurance that they would be active participants and that their tribal concerns would be promptly and appropriately addressed. Accordingly, the use of TCNS (and the FCC's E-

106) is required when railroads are going through the review process established by the Program Comment. Although the use of TCNS is not required in connection with alternative agreements allowed by the Program Comment, its use provides a safe harbor for railroads to satisfy the requirement to make a reasonable and good faith effort to identify relevant Indian tribes for such alternative agreements.

Another issue that raised concerns related to the number of towers and geographic areas that may be incorporated in each individual submission for SHPO and tribal review. While a higher number of poles and wider geographic area covered could speed up the process, such a larger number could present workload issues for reviewers. Likewise, submissions covering a wider geographic area could present problems for TCNS and make consultation unwieldy due to the number of relevant SHPOs and Indian tribes involved. Ultimately, the Program Comment did not prescribe limits of poles or areas to be included in a single submission, but stated that: "to avoid confusion and unmanageable workloads by reviewers and to accommodate technical parameters of the FCC's systems, no later than June 6, 2014, the FCC, in coordination with the FRA and the railroads, will provide guidance regarding the quantity of

poles and extent of geographic areas that should be allowed per submission."

The exclusion proposed regarding wayside poles and infrastructure within the railroad right of way was another subject that engendered discussion. Through its original proposal, the FCC attempted to provide railroads with a similar exclusion to the one that exists in the Nationwide Programmatic Agreement the FCC uses for its Section 106 compliance for telecommunications towers. While some Indian tribes and SHPOs read the exclusion as removing too many poles from consideration, the railroad industry saw it as removing too few since it was limited to poles not more than 10% taller than similar structures in the vicinity. The exclusion was also seen as overly complex, which may explain the differences in how parties interpreted its effect. After much consideration, the exclusion was ultimately revised to be clearer, and to cover wayside poles and infrastructure located within 500 feet of certain existing railroad signal equipment, catenary bridge or catenary mast, or above ground utility transmission or distribution lines, provided they are not located within the boundaries of certain historic properties. The goal was to make the revised exclusion more useful to railroads,

while not eliminating consideration of effects to historic properties when appropriate.

Various concerns were raised regarding monitoring in terms of possible time delays, expense, justification, and contractor safety. The Program Comment attempts to address most of these concerns by, among other things, providing that a request for monitoring must be accompanied by an explanation of the basis for the request; setting forth what must be decided prior to beginning monitoring; explaining when monitoring may not be appropriate and outlining some areas where it may be of particular use; specifying that railroads protocols must be followed to ensure safety; and explaining how to proceed when a previously unknown property is identified.

Railroads were particularly concerned about setting time frames that accommodate the timely installation of wayside poles and infrastructure, and making sure such time frames were met. The Program Comment sets up a review process with shorter and more predictable time frames than the original proposal, and explicitly states that certain eventualities (e.g., request for more information) do not stop the time clock. The only extensions of time frames relate to those considered by the FCC to present exceptional circumstances.

Finally, another issue of concern to many stakeholders had to do with how the FCC and railroads would address the issue about the many wayside poles and infrastructure that were installed prior to Section 106 review. The FCC and the seven Class I Freight Railroads have recently finished negotiating a landmark Memorandum of Understanding (MOU) regarding this matter. The MOU provides for the creation by the railroads of a \$10 million cultural resources fund that will be available to Indian tribes and SHPOs to advance their work in the area of historic preservation. Under the MOU, each freight railroad has also committed to providing training for its employees on environmental and historic preservation reviews and to building working relationships with Indian tribes. The MOU notes the railroads' commitment to full compliance with environmental and historic review requirements on future PTC installations. As a result of this MOU, the railroads are immediately able to start using almost 11,000 poles (one third of the anticipated national deployment) for important testing and other preparatory activities necessary for the ultimate provision of PTC. As the Program Comment states, the agreement "reflects ACHP's input and concerns [, and] [t]he FCC has determined, and the ACHP agrees, that the Memorandum of Understanding with the railroads fully addresses concerns regarding the

previously constructed wayside poles and infrastructure and, to the extent Section 110(k) of the National Historic Preservation Act applied to this situation, any requirements for the FCC to consult with the ACHP under that statute and implementing regulations."

The ACHP also revised the Program Comment to cover many other potential eventualities based on its own review of the request. Accordingly, the Program Comment provides for how it may be amended or withdrawn; how confidentiality concerns may be addressed; how the discovery of human remains will be handled; and how periodic meetings will be held to monitor the effectiveness of the Program Comment.

III. Final Text of the Program Comment

The following is the text of the Program Comment as issued by the ACHP:

Program Comment to Tailor the Federal Communications Commission's Section 106 Review for Undertakings Involving the Construction of Positive Train Control Wayside Poles and Infrastructure

This Program Comment was issued by the Advisory Council on Historic Preservation (ACHP) on May 16, 2014, pursuant to 36 CFR 800.14(e), and went into effect on that date. It provides the Federal Communications Commission (FCC) with an alternative way to comply with its responsibilities

under Section 106 of the National Historic Preservation Act, 16 U.S.C. 470f, and its implementing regulations, 36 CFR part 800 (Section 106), with regard to the effects of wayside poles and associated infrastructure installed by the Nation's freight and passenger railroads to deploy Positive Train Control (PTC) systems on historic properties. It also relieves other federal agencies from the need to conduct separate Section 106 reviews regarding the effects of such poles and infrastructure.

I. Introduction

In response to a 2008 railroad accident in Chatsworth, California that claimed 25 lives and caused over 100 injuries, Congress enacted the Rail Safety Improvement Act of 2008 (P.L. 110-432) (RSIA). According to a Federal Railroad Administration report, an average of 2,000 derailments and 205 train collisions, resulting in 422 injuries and 12 fatalities, occurred annually from 1998 to 2009, excluding accidents at highway-rail crossings. Federal Railroad Administration, Office of Safety, Railroad Safety Statistics, Annual Report, April 1, 2011, pp. 4-20. The RSIA requires freight and passenger railroads to deploy interoperable PTC systems by December 31, 2015. More specifically, RSIA requires PTC system implementation on all Class 1 railroad lines that carry poison- or toxic-by-

inhalation hazardous materials and five million gross tons or more of annual traffic, and on any railroad's main line tracks over which intercity or commuter rail passenger train service is regularly provided. In addition, RSIA provides the Federal Railroad Administration (FRA) with the authority to require PTC system implementation on any other line.

The implementation of the PTC system is a complex undertaking reaching almost every element of affected railroad operations. PTC systems generally use radio signals between trains and a land-based network to prevent certain railroad accidents. When operating, PTC systems will be capable of controlling or stopping a train when a train operator is unavailable or unresponsive and action is required to avoid a derailment, incursion into a work zone, certain train-to-train collisions, or movement through a switch left in the wrong position.

According to FRA, railroads required to implement PTC must do so on over 60,000 of approximately 160,000 miles of track nationwide. In addition, FRA has reported that railroads must design, produce, and install more than 20 major PTC components, such as data radios for locomotive communication, locomotive management computers, and back office servers as part of the PTC implementation. In 2010,

FRA promulgated regulations to implement the requirements of RSIA. The regulations do not require the railroads to use a specific technology or install a specific type of infrastructure as long as the system is designed to meet certain performance objectives.

One of the components necessary to implement PTC systems is the "wayside pole," a vertical structure that will be used to support fixed wireless antennas within the existing railroad right of way alongside existing tracks. Approximately 30,000 wayside poles will be required nationwide, of which at least 10,000 poles have already been installed. Although the precise system architecture varies somewhat depending on topography, the railroad's existing communications systems, and other factors, most of the major railroads intend generally to install wayside poles approximately one to three miles apart along their tracks and at certain switch points and other operational sites. Nearly all of the wayside poles measure between 25 and 65 feet in height, including the antenna, although in some instances the antenna may bring the total height to slightly more than 65 feet. Five of the seven Class 1 freight railroads are typically installing poles with foundations that vary from 5 to 10 feet or in some instances up to 15 feet in depth, depending on site

conditions, and from 12 to 18 inches in diameter. These railroads generally install the foundations either by screwing the shaft directly into the ground or by auger drilling a hole up to 20 inches in diameter. However, some of these railroads have stated that they can use hand excavation methods where necessary in order to assist in ascertaining the presence of archaeological resources or avoiding effects on these properties. The other two Class 1 freight railroads are using precast foundations up to 30 inches square and up to 5.75 feet in depth. These foundations are generally installed using a backhoe to dig a hole up to 4 by 6 feet in surface area and up to 6 feet deep. At many sites, installation will also require using fill rock or dirt, either taken from the excavation hole or trucked in from elsewhere, in order to build up the area immediately adjacent to the track bed.

In addition to wayside poles, the railroads will need to install an estimated 3,000 to 4,000 additional antennas to serve as base stations. These base stations will in most instances be located farther away from the track and at greater heights above ground level, often 100 to 150 feet. While some of the base station antennas will require new tower construction, the railroads have predicted that the majority will be collocated on existing structures.

II. Section 106 Implications

The FCC has determined that the construction of PTC transmission facilities and their supporting structures is a federal undertaking under Section 106. These facilities transmit signals using radio spectrum that has been licensed (or in limited instances will be licensed) to the railroads or their affiliates by the FCC. Pursuant to the FCC's rules, at 47 CFR 1.1307 and 1.1312, the railroads are required to ascertain prior to construction the environmental impacts of facilities constructed to transmit signals under these licenses, including Section 106 review under the relevant procedures set forth by the ACHP and the FCC.

The FCC currently conducts Section 106 review of wireless tower and antenna undertakings in accordance with the Section 106 implementing regulations, 36 C.F.R. part 800, as modified and supplemented by two Nationwide Programmatic Agreements negotiated and executed a decade ago in accordance with 36 CFR 800.14(b). These Nationwide Programmatic Agreements are codified in the FCC's rules at 47 CFR part 1, Apps. B (Nationwide Collocation Agreement) and C (FCC NPA).

There exists the possibility that, through assistance, licensing, permitting, or other approvals, other federal agencies may have Section 106 responsibilities regarding the implementation of PTC. For instance, to the extent that PTC may be implemented within lands managed by federal agencies, such agencies may have to provide approvals to allow the installation of PTC. Other agencies may be involved in financially supporting PTC implementation through grants or other financial assistance.

Various factors unique to PTC implementation call for an approach different from the typical Section 106 review process to provide needed flexibility to the FCC, the railroads, the State Historic Preservation Officers (SHPOs) and Indian tribes. Such a tailored approach will be provided through this Program Comment. Foremost among these factors is the underlying purpose of PTC implementation: to avoid the loss of life and property from preventable train accidents. Another factor is that, unlike many undertakings reviewed under Section 106, a "no build" alternative is not an option. As mentioned above, the RSIA legislation requires the implementation of PTC. Another consideration is the very short window of time for implementation. While the deployment of PTC has an aggressive schedule that may be challenging for reasons unrelated to historic

preservation, the RSIA as it exists today has imposed a fast approaching deadline on railroads. Such deployment necessitates actions beyond the installation of PTC facilities, which create further time constraints. For instance, such facilities, once installed, must be tested and debugged as necessary, before PTC can begin to be used. Finally, due to the technology chosen to implement PTC, there is limited flexibility in the exact location of the wayside poles and therefore there may be somewhat limited strategies to avoid adverse effects to historic properties such as cultural landscapes, archaeological sites, sites of religious and cultural significance to Indian tribes, buildings, and structures.

This Program Comment is responsive to the unusual set of factors surrounding the deployment of PTC. It is not meant to set a precedent for Section 106 Memoranda of Agreement or program alternatives covering different types of undertakings.

III. Scope and Use of this Program Comment

This Program Comment provides an alternative way for the FCC to comply with its Section 106 responsibility to take into account the effects on historic properties of PTC wayside poles that are no taller than 75 feet (including

their antenna) located within existing railroad rights-of-way and PTC wayside pole associated equipment cabinets and other supporting infrastructure (including collocated antennas) also located within existing railroad rights-of-way (collectively, "wayside poles and infrastructure") and to give the ACHP a reasonable opportunity to comment regarding such poles and infrastructure. To achieve such compliance, the FCC may rely on the railroad's implementation of alternative agreements under Section VI, the exclusions under Section V, and the review process under Section VII.

Per Section VIII, this Program Comment also explains how the FCC will comply with its responsibilities under Sections 106 and, as applicable, Section 110(k) of the National Historic Preservation Act for those wayside poles and infrastructure that were installed prior to Section 106 compliance.

This Program Comment does not apply on tribal lands unless the relevant Indian tribe provides to the FCC a written notice agreeing to such application on its tribal lands.

In order to facilitate early consultation under this Program Comment, the ACHP encourages the railroads to work

with the FCC to, as soon as possible, provide SHPOs and Indian tribes with easy access to information about the location of the railroad tracks subject to PTC implementation.

IV. Exemption from Duplicate Review of Effects of Wayside Poles and Infrastructure by Other Agencies

Other federal agencies are not required to comply with Section 106 with regard to the effects of wayside poles and infrastructure that either have undergone or will undergo Section 106 review, or are exempt from Section 106 review, under this Program Comment or any other Section 106 program alternative applicable to the FCC. When federal agencies have undertakings that include wayside poles and infrastructure as well as components in addition to such wayside poles and infrastructure, such agencies will need to comply with Section 106 in accordance with the process set forth at 36 CFR 800.3 through 800.7, or 36 CFR 800.8(c), or another applicable program alternative under 36 CFR 800.14. However, they will not have to consider the effects of the wayside poles and infrastructure on historic properties under the circumstance described earlier in this paragraph.

V. Exclusions

A. The FCC is not required to take into account the effects of the following on historic properties:

(1) wayside poles and infrastructure that are installed within existing railroad rights-of-way, provided that:

(i) they are located within 500 feet of the following structures, so long as such structures are 25 feet tall or taller:

(a) existing railroad signal equipment that includes one or more vertical posts adjacent to the track that displays the signal indication or a platform or bridge extending over the tracks with the signal indication over the track that they control;

(b) an existing catenary bridge or catenary mast; or

(c) above ground utility transmission or distribution lines and associated structures and equipment located within 100 feet of the center line of the railroad right of way; and

(ii) they will not be located within the boundaries of a historic property that is listed in the National Register of Historic Places (National Register), formally determined eligible by the Keeper of the National Register, determined eligible on a SHPO or Indian tribe record, including State archaeological records, or found during any agreed-to monitoring under Section VII;

(2) wayside antennas of less than 10 feet in height that are collocated on existing railroad infrastructure, provided that such infrastructure is not listed in the National Register, formally determined eligible by the Keeper of the National Register, or determined eligible on a SHPO or Indian tribe record; and

(3) wayside poles and infrastructure to be located within the outer boundaries of a system of yard track occupying 100,000 square feet or more, so long as such poles and infrastructure are not located within the boundaries of or within 500 feet of a historic property that is listed in the National Register, formally

determined eligible by the Keeper of the National Register, or determined eligible on a SHPO or Indian tribe record, including State archaeological records. For purposes of this exclusion, a yard track is defined as it is under 49 CFR 245.5(o) ("a system of tracks within defined limits used for the making up or breaking up of trains, for the storing of cars, and for other related purposes, over which movements not authorized by timetable, or by train order may be made subject to prescribed signals, rules or other special instructions"). Although that regulatory definition of yard track excludes sidings and main line track passing through the yard, this exclusion applies to all locations within the yard limits.

B. The FCC is also not required to take into account the effects of wayside poles and infrastructure on the rails themselves or the track bed itself. The track bed consists of the ballast that supports the tracks as well as minor culverts and drainage devices. It does not include the soil beneath the ballast or any archaeological resources within the ballast.

C. Through written notice to the railroad and the FCC, a SHPO or Indian tribe may exempt a railroad from including that SHPO or Indian tribe in the Section VII review of wayside poles and infrastructure within a geographic area defined by that SHPO or Indian tribe, as applicable.

VI. Alternative Agreements

The FCC may comply with its Section 106 responsibilities regarding the effects of wayside poles and infrastructure through railroad implementation of agreements negotiated between the railroad and the relevant SHPO(s) and Indian tribe(s) regarding the review and resolution of adverse effects of such poles and infrastructure within a particular geographic area. The relevant SHPOs are the SHPOs for the States in which the wayside poles and infrastructure covered by the agreement are to be located. The relevant Indian tribes are those Indian tribes that may attach religious and cultural significance to historic properties that may be affected by the installation and operation of the wayside poles and infrastructure covered by the agreement. The railroads must make a reasonable and good faith effort to identify the relevant Indian tribes. Although the use of the FCC's Tower

Construction Notification System (TCNS) is not required in connection with alternative agreements, use of TCNS is the FCC's recommended approach for satisfying the reasonable and good faith standard.

Such agreements must be in writing, and executed by the relevant railroad, and all relevant SHPO(s) and Indian tribe(s), and filed with the FCC's Federal Preservation Officer. FCC applicants are encouraged to use the assistance of qualified professionals (see the definition under Section XII.A., including its recognition of tribal expertise outside the Secretary of the Interior's standards) to facilitate the negotiation and drafting of such agreements. One agreement may include multiple SHPOs and/or Indian tribes.

Once such an agreement has been properly executed and filed with the FCC, the railroad may commence installation of the wayside poles and infrastructure covered by the agreement in accordance with the terms of the agreement. The railroad will maintain adequate documentation regarding its compliance with such an agreement for two years after the agreement has been fully implemented.

If a railroad reaches an agreement with some, but not all, of the relevant SHPO(s) and Indian tribe(s) regarding

the wayside poles and infrastructure to be located in a particular geographic area, the railroad would follow the process in Section VII, below, with those SHPO(s) and Indian tribe(s) not parties to the agreement regarding the wayside poles and infrastructure in that area, and follow the terms of the agreement with the SHPO(s) and Indian tribe(s) that entered into the agreement.

Railroads, SHPOs, and Indian tribes are encouraged to use relevant provisions of the agreement template provided by the FCC under Section VII.G., below, when negotiating these alternative agreements.

VII. Review Process for Effects of Wayside Poles and Infrastructure Not Excluded or Covered by an Alternative Agreement

With regard to wayside poles and infrastructure that are neither excluded under Section V, nor fully covered by an alternative agreement under Section VI, FCC Section 106 compliance regarding the effects of such poles and infrastructure may be carried out using the FCC's TCNS and E-106 systems as follows. Before installing wayside poles and infrastructure in a particular area:

A. With the assistance of qualified professionals (see the definition under Section XII.A., including its recognition of tribal expertise outside the Secretary of the Interior's standards), railroads will prepare a map showing the proposed location of wayside poles and infrastructure to be installed within a selected geographic area (including the poles and infrastructure excluded per Section V, above). To avoid confusion and unmanageable workloads by reviewers and to accommodate technical parameters of the FCC's systems, no later than June 6, 2014, the FCC, in coordination with the FRA and the railroads, will provide guidance regarding the quantity of poles and extent of geographic areas that should be allowed per submission. The map and other information listed below will:

- (1) include an overlay showing the boundaries of documented historic properties within a 1/4 mile area from the location of the wayside poles and infrastructure. "Documented historic properties" means historic properties that are listed in the National Register, formally determined eligible by the Keeper of the National Register, or

identified, after a reasonable and good faith effort search through existing SHPO and tribal records, including State archaeological records as appropriate, as having been determined eligible. SHPOs and Indian tribes are encouraged to make available survey information to railroads to assist in the identification of documented historic properties;

(2) be based on railroad engineering maps with pole coordinates, topographic information, and other background pertinent to the installation of wayside poles and infrastructure;

(3) identify any alternative locations considered by the railroad for wayside poles and infrastructure, that the railroad believes would avoid or minimize adverse effects to documented historic properties, and any proposed minimization and mitigation strategies to address adverse effects to documented historic properties when the railroad takes the position that avoidance is not a viable option;

(4) for each wayside pole and infrastructure, specify the type of wayside pole and

infrastructure and the installation technique that is proposed, and include a photograph of each type of such pole and infrastructure; and

(5) for wayside poles and infrastructure excluded per Section V, above, specify the part of Section V that provides the exclusion for each wayside pole and infrastructure.

In order to facilitate future consultations, the maps should also include the location of the relevant PTC base stations. The submission should also include information about the source of fill material if such material will be used in the installation of the wayside poles and infrastructure.

B. The railroad will provide such a map and supporting documentation to the relevant SHPO and Indian tribes. The relevant SHPO is the SHPO for the State in which the wayside poles and infrastructure covered by the map are to be located. The relevant Indian tribes are those Indian tribes that may attach religious and cultural significance to historic properties that may be affected by the installation and operation of the wayside poles and infrastructure covered by the map.

The railroads must make a reasonable and good faith effort to identify the relevant Indian tribes. Unless another method of submission is specified in an alternative agreement under Section VI, the railroads will use TCNS to submit required information to the Indian tribes and will use the FCC's E106 system (E106) to submit required information to the SHPOs. In the event an Indian tribe or SHPO does not accept submissions through TCNS or E106, the railroads will also provide information to that Indian tribe or SHPO by the means the Indian tribe or SHPO prefers. Use of TCNS meets the railroads' obligation to make a reasonable and good faith effort to identify the relevant Indian tribes. Such use of TCNS, and use of E106, also ensures the FCC will have access to the relevant information if the FCC needs to become involved in the review. The FCC will work with the railroads to coordinate the reasonable timing of submissions.

C. The railroads will also use their regular external communications protocol to inform relevant local governments and federal agencies, and the public of the status of wayside pole and infrastructure

installations and the opportunity for them to provide their views to the railroad regarding adverse effects on historic properties of such installations during the 30-day review process outlined in Section VII.D., below.

D. The relevant SHPO and Indian tribe(s) have 30 days from receipt of a submission under Section VII.A. to review the map and supporting documentation, inform the railroad as to historic properties not identified by the railroad and/or areas likely to contain previously unidentified historic properties, inform the railroad about the need for additional information, and provide recommendations and comments to the railroad. Any request for additional information, and any request for monitoring, will explain the basis for the request and will not suspend the 30-day review period once it commences. Within the review period, the railroad is encouraged to schedule meeting(s) or telephone call(s) with the relevant SHPO and Indian tribe(s) to discuss the adequacy of the map and supporting documentation, and proposed avoidance, minimization and mitigation strategies (including the need for monitoring). If an Indian tribe or SHPO has

not responded within these 30 days, the railroad will refer the matter to the FCC. The Indian tribe or SHPO will have no further opportunity to participate in this review unless the FCC determines otherwise within 10 business days.

If an agreement between the railroad and the relevant SHPO and Indian tribe(s) is reached regarding how the adverse effects of the wayside poles and infrastructure will be avoided, minimized, or mitigated (PTC adverse effect agreement), the railroad will provide the FCC with a copy of the PTC adverse effect agreement. The Section 106 process is then complete, and the railroad may proceed with the installation of the wayside poles and infrastructure covered by the map in accordance with the PTC adverse effect agreement unless the FCC requires further processing for reasons other than Section 106. Such agreements must be in writing, and executed by the relevant railroad, and all relevant SHPO(s) and Indian tribe(s), and filed with the FCC's Federal Preservation Officer.

E. If the railroad is not able to reach a PTC adverse effect agreement with the relevant SHPO and Indian

tribe(s) regarding how the adverse effects of the wayside poles and infrastructure will be avoided, minimized, or mitigated, the railroad will consult further with the relevant SHPO(s) and Indian tribe(s) for a period of no less than 10 business days to attempt to reach such an agreement, and will notify FCC of ongoing consultation and coordination.

(1) At any point after the end of the 10 business days, if the railroad, and the relevant SHPO and Indian tribe(s) are unable to reach a PTC adverse effect agreement, any of these parties may refer the lack of agreement (along with relevant information) to the FCC, with a copy to the ACHP.

(2) Within 10 business days after receipt of the referral and supporting documentation, the FCC will make a decision as to how the adverse effects of the wayside poles and infrastructure will be avoided, minimized, or mitigated, unless the FCC finds it necessary to extend this time period due to exceptional circumstances such as those involving sensitive historic properties and confidentiality concerns. During this period, the FCC will consult with the SHPO as appropriate and

with Indian tribes as necessary to fulfill its trust responsibilities to Indian tribes. If the ACHP so requests, the FCC will consult with the ACHP during this period and will consider the timely comments of the ACHP in making its decision. At the end of the 10 business day period (plus extensions, if any), the railroad may then install the wayside poles and infrastructure in accordance with the FCC decision, if any, unless the FCC requires further processing for reasons other than Section 106.

F. (1) If, as part of consultations described in Section VII.D., the relevant SHPO and/or Indian tribe(s) request monitoring of construction for specific areas or wayside poles, the railroad will collaborate with the relevant SHPO and/or Indian tribe(s) to:

(i) determine the proposed location of monitoring;

(ii) develop a scope of work for the monitors, including railroad monitoring protocols, coordination of information

sharing regarding newly discovered historic properties, and compensation; and

(iii) establish a monitoring plan that is consistent with rail safety, PTC implementation scheduling, and approved engineering drawings.

Monitoring ordinarily will not be useful where a pole will be installed by helical screw due to the lack of removed sediments for observation or analysis, but may be appropriate in cases involving a pit excavation up to 30 square feet in surface area.

(2) The purpose of monitoring prior to installation of PTC wayside poles is to avoid or minimize disturbance of previously unknown and potentially National Register-eligible properties and to record the presence of such properties so that effects to them may be considered during future ground-disturbing activities.

(3) Areas with high probability of containing unknown National Register eligible sites may include, but are not necessarily limited to:

(i) areas within close proximity to existing and previous natural water courses known to exhibit prehistoric habitation or use;

(ii) areas in close proximity to previously identified prehistoric archaeological resources;

(iii) areas identified as having potential for buried/subsurface archaeological deposits based on a professional geo-archaeological analysis; and/or

(iv) areas identified through consultation with tribal representatives as having sensitivity for tribal cultural resources.

(4) All monitors must be qualified professionals (see the definition under Section XII.A., including its recognition of tribal expertise outside the Secretary standards).

(5) All monitors will adhere to the applicable railroad protocols. To address safety and logistical concerns associated with monitoring, monitors must attend requisite training held by the railroads. Any concerns or disputes regarding

monitoring will be submitted to the FCC for resolution, recognizing the time sensitive nature of monitoring for PTC installations.

(6) If a tribal or archaeological monitor finds that a previously unknown property exists at the location of a planned wayside pole installation, railroad personnel shall notify the FCC and will determine whether the pole location can be moved to avoid the property. If avoidance is possible, the monitor will record the property and installation of the pole will be completed at the new location. If the railroad personnel determine that the pole location cannot be moved, the monitor will record the property on the relevant State form, and the railroad will proceed consistent with the PTC adverse effect agreement prior to installation of the pole.

(7) If a tribal or archaeological monitor observes cultural materials being exposed during mechanical excavation of the pit for placement of the wayside pole foundation, railroad personnel shall notify the FCC and immediately halt the excavations. The monitor will record the exposed

evidence, complete in-field analysis of any artifacts, record any visible features and take samples if appropriate, and consult with railroad personnel to determine how best to complete installation of the pole while minimizing further damage.

(8) Monitors will complete appropriate recordation forms for any discovered properties and submit them to the appropriate state or tribal records repository.

G. FCC will prepare an agreement template and guidance on standard measures to assist in the PTC adverse effect agreement drafting and negotiation mentioned above.

H. The ACHP encourages railroads to specify how wayside poles and infrastructure adjacent to or within the boundaries of a historic property will be disassembled if and when they become obsolete.

I. The ACHP encourages railroads to use fill that has not come from sites associated with historic properties in order to avoid the need for further Section 106 consideration of the effects of such use.

VIII. Previously Constructed Facilities

The FCC has entered into a Memorandum of Understanding with the railroads with respect to the wayside poles and infrastructure that were installed without prior compliance with the requirements of Section 106. The FCC provided the ACHP with a five-day opportunity to review the Memorandum of Understanding. The executed Memorandum of Understanding reflects ACHP's input and concerns. The FCC has determined, and the ACHP agrees, that the Memorandum of Understanding with the railroads fully addresses concerns regarding the previously constructed wayside poles and infrastructure and, to the extent Section 110(k) of the National Historic Preservation Act applied to this situation, any requirements for the FCC to consult with the ACHP under that statute and implementing regulations.

IX. Discoveries

A. Human Remains Discovery - Unless there are applicable provisions under an alternative agreement under Section VI or a PTC adverse effect agreement under Section VII.D. regarding the discovery of human remains, if human remains are discovered at any time in project implementation, the railroad will

immediately cease work at the site, except for work that may be necessary to secure the site, and:

(1) comply with State burial law or NAGPRA, as applicable; or

(2) if no such State law or NAGPRA is applicable, and an agreement with the relevant SHPO and Indian tribe(s) cannot be reached on treatment measures for human remains within 10 business days of the discovery, the matter will be referred by the railroad to FCC, with a copy to the ACHP, for a final resolution by the FCC. FCC will respond within 10 business days after the receipt of the referral, unless the FCC finds it necessary to extend this time period due to exceptional circumstances, such as those involving sensitive historic properties and confidentiality concerns. The FCC will consult with the SHPO and Indian tribes during this period as appropriate and to the extent necessary to fulfill its trust responsibility to Indian tribes. If the ACHP so requests, the FCC will consult with the ACHP during this period and will consider the timely comments of the ACHP in

making its decision. The railroad may then continue the installation of the relevant wayside poles and infrastructure in accordance with the FCC decision. It is the expectation of the ACHP that human remains will be treated with respect, consistent with the ACHP's Policy Statement Regarding Treatment of Burial Sites, Human Remains and Funerary Objects, dated February 23, 2007.

B. Other Discoveries - Unless there are applicable provisions under an alternative agreement under Section VI or a PTC adverse effect agreement under Section VII.D. regarding the discovery of historic properties (other than those containing human remains), the railroad will follow the applicable provisions of 36 CFR 800.13(b).

X. Involvement of FCC as Requested by Indian Tribes

While the Program Comment is set up so as to operate mostly without the continuous involvement of the FCC, an Indian tribe that desires the involvement of the FCC at any point in the processes described in this Program Comment may request the FCC to become so involved, and the FCC will decide how to become involved consistent with its

responsibilities towards Indian tribes. Such involvement by the FCC does not extend the deadlines provided in this Program Comment.

XI. Confidentiality Concerns

If a railroad, an Indian tribe, or a SHPO raises a confidentiality concern regarding information to be exchanged under this Program Comment, and such concern cannot be resolved through a confidentiality agreement among the relevant parties, that party may request that the FCC resolve the concern.

XII. Administrative Provisions

A. Definition of a "qualified professional" - A "qualified professional" is a person who meets the relevant standards outlined in the Secretary of the Interior's Historic Preservation Professional Qualification Standards, consistent with the proposal at 62 FR 33708 - 33723 (June 20, 1997). These qualification standards do not apply to individuals recognized by the relevant Indian tribes to have expertise in identification, evaluation, assessment of effect, and treatment of effects to historic

properties of religious and cultural significance to their tribes.

B. Other definitions - Unless otherwise defined in this Program Comment, the terms used in this Program Comment will have the meaning ascribed to them under 36 CFR part 800 (2004).

C. Duration - This Program Comment will be in effect until May 16, 2021, unless extended through an amendment per Section XII.D., below.

D. Amendments - The Chairman of the ACHP may amend this Program Comment after coordinating with the FCC and other parties as deemed appropriate by the Chairman, and providing written notice about the amendment to the FCC, the FRA, the Association of American Railroads, the American Public Transportation Association, the American Short Line and Regional Railroad Association, the National Conference on State Historic Preservation Officers, and the National Association of Tribal Historic Preservation Officers.

E. Withdrawal of Program Comment - If the Chairman of the ACHP determines that the consideration of historic properties is not being carried out in a manner

consistent with this Program Comment, the ACHP Chairman may withdraw this Program Comment after consulting with the FCC, the FRA, the Association of American Railroads, the American Public Transportation Association, the American Short Line and Regional Railroad Association, the National Conference on State Historic Preservation Officers, and the National Association of Tribal Historic Preservation Officers, and thereafter providing them written notice of the withdrawal.

F. Periodic Meetings - Through the duration of this Program Comment, the ACHP and the FCC will meet semi-annually (during September and March) during the first two years of this Program Comment and then annually thereafter (in March) to discuss the effectiveness of this Program Comment, including any issues related to improper implementation, and to discuss any potential amendments that would improve the effectiveness of this Program Comment. The FCC may, and will if requested by the ACHP, also invite the FRA, the Association of American Railroads, the American Public Transportation Association, the American Short Line and Regional Railroad Association, the National

Conference on State Historic Preservation Officers,
the National Association of Tribal Historic
Preservation Officers, and tribal representatives to
these meetings or any portion thereof.

G. Complaints regarding implementation of this Program
Comment - Members of the public may refer to the FCC
any complaints regarding the implementation of this
Program Comment. The FCC may handle those complaints
consistent with Stipulation XI of the FCC NPA.

Authority: 36 CFR 800.14(e)

Dated: May 19, 2014

John M. Fowler,
Executive Director

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